

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ROBERT SANDVIK,

Defendant-Appellant.

UNPUBLISHED

November 18, 2003

No. 242000

Schoolcraft Circuit Court

LC No. 01-006288-FH

Before: Cooper, P.J., and Markey and Meter, JJ.

MEMORANDUM.

Defendant was convicted by a jury of fourth degree fleeing and eluding, MCL 750.479a(2), and operating a vehicle while impaired, MCL 257.625(3). He was sentenced to four months for fleeing and eluding and to sixty days on the impaired conviction. He appeals by right. We affirm.

Defendant was operating his motorcycle at speeds up to 105 miles per hour for approximately nine miles while being followed by a Department of Natural Resources truck that had its siren activated. He smelled of intoxicants when apprehended. Field sobriety tests yielded mixed results, but a breathalyzer test subsequently resulted in readings of .08, .10 and .09.

Defendant argues that the trial court erred in denying his motion to dismiss, which was based on the erasure of a thirty-second videotape taken at the time defendant was initially stopped. The tape would have shown how the motorcycle was parked, that defendant was not on his motorcycle during the taping, and whether defendant had balance and coordination problems.

The suppression of material exculpatory evidence violates a defendant's due process rights. However, if only potentially exculpatory, the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that its exculpatory value was apparent before its destruction; and (3) that the defendant would be unable to obtain comparable evidence by other reasonably available means. *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996); *Arizona v Youngblood*, 488 US 51, 57-58, 109 S Ct 333, 102 L Ed 2d 281(1988); *California v Trombetta*, 467 US 479, 488-489, 104 S Ct 2528, 81 L Ed 2d 413 (1984). Defendant bears the burden of showing that the evidence was exculpatory. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Defendant failed to meet his initial burden. Everyone agreed that the motorcycle was turned around. Defendant asserted that was how he came to a stop and the officers surmised that he was turning around, but the actual positioning was not disputed. Defendant claimed that he was getting off his motorcycle as the officers approached. However, the taping began after the officer got out of his vehicle. That defendant had gotten off his cycle at that point was irrelevant. The tape may have helped establish that defendant did not have balance and coordination problems. However, he had just successfully maneuvered a motorcycle at excessive speed for over nine miles, and there was no testimony that he was unsteady. That he could not stand on one leg very well during a subsequent sobriety test did not suggest that he was lacking coordination at the time of the stop. Thus, the videotape showing no lack of coordination would not have been materially or potentially exculpatory. Moreover, where the officer was taping the incident for training purposes, not to create an evidentiary record, and thought the thirty seconds was of no value, defendant failed to establish the “official animus” or “conscious effort to suppress” necessary for dismissal. See *Trombetta, supra*, 467 US 488.

Affirmed.

/s/ Jessica R. Cooper
/s/ Jane E. Markey
/s/ Patrick M. Meter